

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date Issued: August 22, 2001

BALCA Case No. 2000-INA-207
[ETA No. P1998-NY-02371493]

In the Matter of:

MARY MINDEL,
Employer,

on behalf of

MARIUSZ LUCZAK,
Alien

Certifying Officer: Dolores DeHaan, New York, NY

Appearances: Seymour Magier, Esq.
New York, NY
For Employer

Before: Burke, Vittone and Chapman
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This matter arises from Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of Domestic Cook. Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the record upon which the CO denied certification and Employer's request for review and any written arguments. 20 C.F.R. 656.27(c).

STATEMENT OF THE CASE

On May 8, 1997, Employer, Mary Mindel, filed an Application for Alien Employment Certification seeking to fill the position of "Domestic Cook (Live-out)." (AF 61-64). In the original application, the duties were listed as follows:

Plan menus, purchase food. Prepare, cook, bake meals for household members & business/social guests as suitable for occasion & according to recipes and considering taste & dietary requirements. Prepare meals following traditional Polish cuisine recipes. Clean kitchen. Wash & iron table linens. Set & decorate table. Decorate plates. Arrange food for cocktail parties. Serve meals. Polish silverware.¹

(AF 21). Employer required two years of experience in the job offered. *Id.*

On June 18, 1999, the CO issued a Notice of Findings (“NOF”), noting that “the requirement that applicants have experience in a particular type of ethnic/religious food is employer’s personal preference and not a normal job requirement.” (AF 27). The CO, therefore, advised Employer to either delete the restrictive requirement calling for the applicant to have two years of specialized experience in the preparation of Polish food or submit evidence to show that a business necessity warranted the requirement pursuant to §656.21(b)(2). (AF 26-27). The CO also questioned whether the position presented a bona fide job opportunity under §656.20(c)(8). (AF 27-29).

Employer filed her Rebuttal to the NOF on July 24, 1999 (AF 35-42). The Rebuttal primarily consisted of answers to the twelve questions presented in the NOF regarding the existence of a bona job opportunity and did not explicitly address the business necessity issue. *Id.* Employer did maintain, however, that her family’s religious background (Jewish) gave her the right to hire a cook who specializes in Polish cuisine. (AF 38). Although Employer said that she frequently entertains at home, particularly on the Jewish holidays, she professed that she was unable to submit an entertainment schedule because she could no longer remember pertinent details such as the actual dates of the events or the number of guests invited. (AF 36-37).

On November 23, 1999, the CO issued her Final Determination (“FD”), denying the application on the ground that Employer failed to submit requested evidence to support the business necessity of the ethnic cooking requirement. (AF 45-46).

On December 23, 1999, Employer filed a Motion to Reopen/Request for Appeal. (AF 67-68). The CO denied the request for reconsideration. (AF 69). Neither a statement of position nor a legal brief has been received since the case was docketed by this Board.

¹ The duties were amended by Employer in a motion to reopen to include the following:
Prepare dishes such as pierogi, nalensniki (blintzes), potato latkes,
slishkes, goulash, golabki (stuffed cabbage), borscht (red and white),
stuffed peppers, ryba faszerowana (gefilte fish), pasztet and other dishes. (AF 64).

DISCUSSION

In *Martin Kaplan*, 2000-INA-23 (July 2, 2001) (*en banc*), the Board held that "cooking specialization requirements for experience in specific styles or types of cuisine are unduly restrictive within the meaning of the regulation at section 656.21(b)(2), and therefore must be justified by business necessity." *Kaplan*, 2000-INA-23, slip op. at 3. To establish business necessity under section 656.21(b)(2)(i), an employer must demonstrate that the job requirements bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform, in a reasonable manner, the job duties as described by the employer. *Information Industries, Inc.*, 1988-INA-82 (Feb. 9, 1989) (*en banc*). In the context of domestic cook specialization requirements, the first prong of the business necessity test may often focus on how the cooking specialization is related to the family's need for a cook. The second prong of the test may often focus on whether the length of experience stated by the employer as a job requirement is required to be able to cook the specialized cuisine. *Kaplan*, *supra* slip op. at 10.

First, before addressing the merits of this case, we must attend to a matter regarding adequacy of representation that Employer brought to our attention in her Request for Review. Employer has claimed that Mr. Olshevski, her lay representative in these proceedings, misrepresented himself as a certified member of the Bar, submitted the Rebuttal without Employer's approval or signature, and made numerous factual errors in the documentation submitted on her behalf. (AF 55). Employer has further contended that the inadequacy of her representation denied her due process, and therefore, urged this Board to reconsider the case, using her own rebuttal to the NOF, submitted with the Request for Review, as the basis for making a final determination. (AF 54). Since the CO's denial to reopen the case was based on *Harry Tancredi*, 1988-INA-441 (Dec. 1, 1988) (*en banc*), the CO did not review the new evidence submitted by Employer, and thus, the evidence is not properly before this Board.²

Where an employer has requested review based upon new counsel because the former counsel provided inadequate representation, we have required the employer to "show that there exists a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Four Oaks Restaurant*, 1997-INA-532 (Nov. 13, 1998); *see also Trim Aire Aviation, Inc.*, 1995-INA-396 (Dec. 4, 1996) (*per curiam*) (holding that an untimely rebuttal is not considered absent egregious factors and there is no assurance that certification would have been granted absent the lack of a complete rebuttal). We consider

² Although the additional rebuttal is not considered part of the record, it does contain information that helps clarify an issue of semantics that arises in this application, but that does not affect the reasoning on which the final outcome is based. On the original ETA-750A application form, the job description called for a cook to prepare Polish foods whereas elsewhere in the application file Employer referred to the cuisine type as "Kosher-style cooking." (AF 21, 35). Although at first glance Employer appears confused about the type of specialization she is requiring, Employer clarified in her additional rebuttal that because she is Jewish and grew up in Poland, she equates Polish cuisine with traditional Jewish dishes. (AF 52). Thus, with the two styles of cooking being synonymous, it is unnecessary to conduct a preliminary analysis under *Kaplan* as to whether Employer maintains a Kosher home since it is clear that she is not requiring a cook to handle strictly Kosher foods.

Employer's additional rebuttal to be an attempt to demonstrate that had she had competent counsel, her application would have been approved. However, even assuming that the additional rebuttal materials are part of the record properly considered by the Board, we are not persuaded by the argument that a change in counsel would have led to a different result since it is clear that even with a clarification and/or addition of information, Employer still fails to fulfill the second prong of the business necessity test which requires Employer to demonstrate that the job requirements are essential to the performance of the job duties.

In her Request for Review, Employer maintained that "the art of preparing such dishes correctly is an art that is acquired over time," but then admitted that she has "no evidence to support a position that an applicant with two years cooking experience could not readily adapt to a Polish style of cooking." (AF 51-52). Thus, without supporting evidence, she has failed to prove that an otherwise experienced domestic cook is unable to learn Polish/Jewish cooking within a reasonable period of taking the job.

Employer also averred that she doesn't "have the time to teach a new cook who has never cooked the dishes [she has] suggest[ed]" and since she now lives alone, there is no else available in the household to train a cook. (AF 51-52). Incapacity to provide training, however, does not furnish evidence relating to the length of time it takes to gain competency in Polish/Jewish cooking. Nor does it suggest that someone without experience cooking Polish/Jewish food cannot learn how to prepare the cuisine via another method, such as through the consultation of cookbooks. Thus, in light of the foregoing, the two year specialization requirement remains unduly restrictive since Employer has not sufficiently linked the requirement to successful execution of the job.

ORDER

Since we find that Employer has not documented that two years of experience in the cooking specialization is supported by a business necessity, we **AFFIRM** the CO's Final Determination denying alien labor certification.

SO ORDERED.

Entered at the direction of the Board by:

Todd R. Smyth
Secretary to the Board of Alien Labor
Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.